REMARKS

Claims 1 and 5-55 are pending in this application. In the non-Final Office Action mailed November 27, 2007, claims 1 and 5-55 were rejected. Reconsideration of the present application is respectfully requested.

Claims 1 and 5-55 were rejected for obviousness-type double patenting in view of claims 1-13 and 24-40 of copending Application No. 11/112,586. It is noted that the USPTO PAIR site indicates the '586 application is abandoned. Therefore, withdrawal of the double patenting rejection is respectfully requested.

Claim 1 and 5-55 also were rejected under 35 USC §102(e) as being anticipated by U.S. Patent Application Publication No. 2004/0225295 to Zubok et al. In making the rejection, the examiner asserts that Zubok et al. disclose "a housing 5200 coupled to opposing guide members 5100, a spreader 4040, and a drive member 4000. The guide members are pivotally joined an having an outer surface 5140 and a guide surface 5118, a slot 5150 extending therebetween and opening at a distal end with distal ends 5120 being positionable in the space between vertebrae. The spreader 404 is inserted between the guide members, has a central body and a pair of opposite wings 4204 extending therefrom and is accommodated by slot 5150 on the opposing guide members. The drive member is coupled to spreader 4040 and is used to forwardly advance the spreader. The spreader also has an engaging member extending between the spreader 4040 and each of the plate members of the implant."

The examiner asserts that the arguments filed June 20, 2008 "fail to comply with 37 CFR 1.111(b) because the amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentable distinguishes them from the references. Applicant has not shown how the same, corresponding and/or similar structure and disclosure in the parent applications allegedly fails to provide a basis for the rejection." The assertion is not understood since it was previously shown that subject matter relied upon in making the rejection was not prior art to the present application, and that this subject matter was not disclosed in the parent applications to Zubok et al. As stated in the previous response, Zubok et al. was filed on February 20, 2004 and the present application was filed on January 26, 2004. Accordingly, Zubok et al. is not potentially prior art under 35 USC §102(e) unless the subject matter disclosed therein and used to reject the claims is also disclosed in an application to which Zubok et al. claim priority having a filing date prior to January 26,

2004. A review of each of the applications to which Zubok et al. claim priority does not reveal any disclosure of distractor 5000 in Figures 7-9. Therefore, at least distractor 5000 with its housing 5200 and guide members 5100 are not prior art to the present application. Since the rejection in the previous office action, and again in this final office action, relies upon subject matter in a reference that is not prior art to the present application, a *prima facie* case for rejecting the claims has not been established. Therefore, the rejection is improper and withdrawal of the same is respectfully requested.

In addition, it is not clear what the examiner would consider to be "the same, corresponding and/or similar structure and disclosure in the parent applications" that would provide a basis for rejecting the claims since none of the parent applications to Zubok et al. has been cited in rejecting the claims in the present application. Distractor 5000 and the subject matter of Figures 7-9 in Zubok et al. are not disclosed in the parent applications of Zubok et al., so it is not clear how the parent applications could be considered to provide a basis for the rejection since no disclosure of distractor 5000 in Zubok et al. or any same, corresponding and/or similar structure to distractor 5000 has been identified.

With regard to the cited Publication No. 2004/0225295 to Zubok et al., and its parent applications, there is disclosed a disc 160 and an inserter/impactor 4000 to hold disc 160 to insert disc 160 in the space between vertebrae. However, disc 160 and inserter/impactor 4000 lack any "a housing" and "a pair of opposing guide members coupled to said housing, each of said pair of guide members including a body with an outer surface and an opposite guide surface and an elongated slot opening therebetween, said slot extending along said respective guide member, the implant being positionable between said guide surfaces" as recited in independent claim 1. Nor were these features of the housing with guide members coupled to the housing in combination with the implant identified in any of the parent applications of Zubok et al. Claim 1 also recites "said housing includes a coupling portion and a drive member engaging portion extending proximally from said coupling portion, said drive member engaging portion and said coupling portion including a passage extending therethrough for receiving said drive member; said drive member includes a shaft threadingly engaged in said passage and a handle at a proximal end of said shaft...." These features of the housing and its arrangement with drive member also were not identified as being disclosed in Zubok et al. or its parent applications. Therefore, claim 1 and its dependent claims are allowable at least for these reasons.

Independent claim 8 recites, among other features, "a housing; a pair of opposing guide members coupled to said housing, each of said pair of guide members including a body with an outer surface and an opposite guide surface and an elongated slot opening therebetween, said slot extending along said respective guide member, the implant being positionable between said guide surfaces; a spreader positioned between said pair of guide members, said spreader including a central body and a pair of opposite wings extending therefrom, each wing being slidingly received in said slot of a corresponding one of said pair of guide members...." As discussed above, disc 160 and inserter/impactor 4000 of Zubok et al. lack the features of the housing and the opposing guide members coupled to the housing, nor were these features of the housing with guide members and the claimed arrangement of the housing and the spreader identified or disclosed in the parent applications of Zubok et al. Therefore, claim 8 and its dependent claim are allowable at least for these reasons.

Independent claim 10 also recites "a housing; a pair of opposing guide members coupled to said housing, each of said pair of guide members including a body with an outer surface and an opposite guide surface and an elongated slot opening therebetween, said slot extending along said respective guide member, the implant being positionable between said guide surfaces; a spreader positioned between said pair of guide members, said spreader including a central body and a pair of opposite wings extending therefrom, each wing being slidingly received in said slot of a corresponding one of said pair of guide members....." As discussed above, disc 160 and inserter/impactor 4000 of Zubok et al. lack the features of the housing and the opposing guide members coupled to the housing, nor were these features of the housing with guide members and its claimed arrangement with the spreader identified or disclosed in the parent applications of Zubok et al. Therefore, claim 15 and its dependent claims are allowable at least for these reasons.

Independent claim 15 recites, among other features, "a housing; a pair of opposing guide members coupled to said housing, each of said pair of guide members including a body with an outer surface and an opposite guide surface and an elongated slot opening therebetween, said slot extending along said respective guide member, the implant being positionable between said guide surfaces; a spreader positioned between said pair of guide members, said spreader including a central body and a pair of opposite wings extending therefrom, each wing being slidingly received in said slot of a corresponding one of said pair of guide members..." As

discussed above, disc 160 and inserter/impactor 4000 of Zubok et al. lack the features of the housing and the opposing guide members coupled to the housing, nor were these features of the housing with guide members and its claimed arrangement with the spreader identified or disclosed in the parent applications of Zubok et al. Therefore, claim 15 and its dependent claim are allowable at least for these reasons.

Independent claim 17 recites, among other features, "a housing; a pair of opposing guide members coupled to said housing, each of said pair of guide members including a body with an outer surface and an opposite guide surface and an elongated slot opening therebetween, said slot extending along said respective guide member, the implant being positionable between said guide surfaces; a spreader positioned between said pair of guide members, said spreader including a central body and a pair of opposite wings extending therefrom, each wing being slidingly received in said slot of a corresponding one of said pair of guide members...." As discussed above, disc 160 and inserter/impactor 4000 of Zubok et al. lack the features of the housing and the opposing guide members coupled to the housing, nor were these features of the housing with guide members and its claimed arrangement with the spreader identified or disclosed in the parent applications of Zubok et al. Therefore, claim 17 and its dependent claim are allowable at least for these reasons.

Independent claim 20 recites, among other features, "a housing; a pair of opposing guide members coupled to said housing, each of said pair of guide members including a body with an outer surface and an opposite guide surface, the implant being positionable between said guide surfaces; a spreader positioned between said pair of guide members...." As discussed above, disc 160 and inserter/impactor 4000 of Zubok et al. lack the features of the housing and the opposing guide members coupled to the housing, nor were these features of a housing with guide members and its claimed arrangement with the spreader identified or disclosed in the parent applications of Zubok et al. Therefore, claim 20 and its dependent claims are allowable at least for these reasons.

Independent claim 30 is a method claim and recites, among other features, "providing an implant inserter comprising: a housing; a pair of opposing guide members coupled to the housing; a spreader positioned between the pair of guide members, the spreader including a central body and a pair of opposite wings extending therefrom slidingly received in a slot formed along a central axis of a respective one of the pair of guide members...." As discussed above,

disc 160 and inserter/impactor 4000 of Zubok et al. lack the features of the housing and the opposing guide members coupled to the housing, nor were these features of a housing with guide members and its claimed arrangement with the spreader identified or disclosed in the parent applications of Zubok et al. Therefore, claim 30 and its dependent claims are allowable at least for these reasons.

Independent claim 41 recites, among other features, "a housing; a pair of opposing guide members extending distally from said housing, said pair of guide members each including an elongated body with an outer surface and an opposite inner surface facing the inner surface of the other guide member with the implant being positionable between said inner surfaces, said guide members further each including a distally extending elongated slot extending between and opening along said inner surface and said outer surface of said guide member; a central body between said pair of guide members, said central body including opposite wings extending therefrom slidingly received in respective ones of said slots of said guide members...." As discussed above, disc 160 and inserter/impactor 4000 of Zubok et al. lack the features of the housing and the opposing guide members coupled to the housing, nor were these features of a housing with guide members and its claimed arrangement with the central body identified or disclosed in the parent applications of Zubok et al. Therefore, claim 41 and its dependent claims are allowable at least for these reasons.

Independent claim 54 recites, among other features, "a housing; a pair of opposing guide members extending distally from said housing, said pair of guide members each including an elongate body with an outer surface and an opposite inner surface facing the inner surface of the other guide member, said guide members further each including an elongated slot extending between and opening along said inner surface and said outer surface thereof with the implant being positionable between said guide surfaces, each of said guide members further including an abutment member adjacent a distal end thereof with said slot of said guide member extending through said abutment member, said abutment members being positionable in contact with the adjacent bony portions; a central body between said pair of guide members, said central body including opposite wings extending therefrom slidingly received in respective ones of said slots of said guide members...." As discussed above, disc 160 and inserter/impactor 4000 of Zubok et al. lack the features of the housing and the opposing guide members coupled to the housing, nor were these features of a housing with guide members and its claimed arrangement with the

central body identified or disclosed in the parent applications of Zubok et al. Therefore, claim 54 and its dependent claim are allowable at least for these reasons.

The present application is believed to be in condition for allowance. Reconsideration and allowance of the present application including claims 1 and 5-55 is respectfully requested. The Examiner is welcome to contact the undersigned to resolve any outstanding issues with respect to the present application.

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